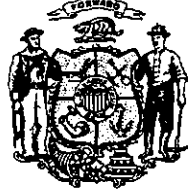


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BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals

Application of M. James Simonson to Construct a
Wharf Off a Channel Connected to Lake
Winnebago, Winnebago County, Wisconsin

Case No. 3-LM-96-1034

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on December 2, 1996, at Oshkosh, Wisconsin. Jeffrey D. Boldt, Administrative Law Judge (the Administrative Law Judge) presided. The parties submitted written closing arguments and the last was received on December 23, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

M. James Simonson, by

Gary R. Yakes, Attorney
Yakes, Bauer, Kindt & Phillips, S.C.
P. O. Box 1338
Oshkosh, WI 54902-1338

Wisconsin Department of Natural Resources (the DNR or the Department), by

Michael Cain, Attorney
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. M. James Simonson, 824 Leeward Court, Oshkosh, Wisconsin, 54901, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place a structure on the bed of a channel connected to Lake Winnebago, City of Oshkosh, Winnebago County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the SE 1/4 of the NE 1/4 in Section 12, Township 19 North, Range 17 East, Winnebago County. The above-described property abuts a channel connected to Lake Winnebago which is navigable in fact at the project site.

3. The applicant proposes to construct a wharf eight feet wide by forty feet long. The wharf would be used to dock boats for recreational boating. The applicant also proposes to construct a bench along the length of the wharf (See: Exhibit 1), in an effort to improve the appearance of the old stone retaining wall. (See: Exhibit 4)

4. The proposed structure will not materially obstruct existing navigation on the channel connected to Lake Winnebago. The channel is approximately 65 feet wide in the project area. Even with boats moored on either side of the channel, there should be sufficient room to allow for boats to navigate through the channel.

5. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

6. The proposed structure will not reduce the effective flood flow capacity of Lake Winnebago.

7. The Department has drafted a Program Guidance related to Riparian Berths and Moorings (the Guidance). (Exhibit 12) The Guidance does not have the effect of law. However, the Guidance represents a statement of Department expertise relating to reconciling the public trust doctrine with individual riparian rights. As such, some deference is owed to the Guidance. Sterlingworth v. DNR, 95-3526 (Wis. Ct. App. Dist. 2, Decided Nov. 22, 1996). See: Generally, Barns v. DNR, 184 Wis. 2d 645, 506 N.W.2d 155 (Wis. Ct. App. 1993).

With respect to the width of wharves and piers, the Guidance states as follows:

PIER AND WHARF WIDTH AND ACCESSORY CONSTRUCTION

A maximum width of 6 feet for piers and wharves is reasonable unless the owner can demonstrate that a greater width is essential for berthing the type of watercraft to be located there. This width allows the limited use prescribed for these structures by statute, i.e. loading and unloading of

cargo and passengers from watercraft [s. 30.01(5), Stats.]. A 6 foot width allows persons to pass safely on a pier or wharf and provides adequate room to set aside recreational gear during loading and unloading. Incidental uses such as fishing or swimming are those which are related to navigation and do not require the physical dimensions of a pier or wharf to be altered beyond what is required to provide navigation access. The private appropriation of lake or riverbed for the construction of decks for general outdoor living activities is not incidental to navigation and is inconsistent with the public trust doctrine. Commercial shipping or industrial facilities may qualify for a wider pier or wharf if they can demonstrate a need and lack of reasonable alternatives. (Exhibit 12)

In the instant permit application, the applicant has not demonstrated any need for a pier width greater than 6 feet. The applicant admitted that he could moor his boat and obtain access to the public waters with a six foot wide wharf. The benefit of an eight foot wide pier would not relate to either access to public waters or the ability to navigate on said waters. Rather, the applicant stated that he believed the wider pier would better cover the old retaining wall and would also allow for placement of a table and chairs on the wharf structure. The Guidance document reflects long-standing Department policy that such non-navigation related purposes are not a proper use of waters held in public trust. "The private appropriation of lake or riverbed for the construction of decks for general outdoor living activities is not incidental to navigation and is inconsistent with the public trust doctrine." (Exhibit 12, p. 6)

Under these circumstances, it is appropriate to defer to the Department's expertise as reflected in both the testimony of Ms. Locke and the Guidance Document. Because the applicant has not demonstrated any need for a wider wharf, the permit application must be denied.

8. There would be cumulative detrimental impacts in allowing piers greater than necessary for navigational purposes to proliferate in sensitive near-shore areas. (Locke) While an additional two foot width reflected in the instant application would have a localized and limited impact on the channel, the cumulative impacts of numerous wide wharves would be detrimental to near-shore areas. The Department is required to consider not just the potential detriments of an individual pier application, but also the cumulative impacts of allowing a given practice on a state-wide basis. (Hixon v. PSC, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966)) (See: Locke testimony)

9. The proposed structure will not adversely effect water quality nor will it increase water pollution in Lake Winnebago. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats.

10. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
2. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
3. The proposed facility described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.
4. The proposed project would be "detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats.
5. The DNR and the Division must consider the cumulative impacts of permitting structures under Chapter 30, Stats. Hixon v. Public Service Commission, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966).
6. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environment impact assessment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the permit application be Denied, for reasons set forth above.

Dated at Madison, Wisconsin on January 28, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____


JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.